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Supreme Court of the United States
OCTOBER TERM, 1987

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SUPREME COURT, U.S.

W
STEVEN ANTHONY PENSON,
Petitioner,
v.

STATE OF OHIO,
Respondent.

On Writ of Certiorari to the Court of Appeals
of Montgomery County, Ohio

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 21, 1987
CERTIORARI GRANTED FEBRUARY 22, 1988

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RELEVANT DOCKET ENTRIES

Montgomery County Court of Common Pleas

August 10, 14, 21, 1984 Indictment filed.
December 7, 1984 Petitioner Penson found guilty by jury of twenty-two counts.
January 8, 1985 Order of appointment of appellate counsel filed.
January 9, 1985 Petitioner Penson sentenced to eighteen (18) to twenty-eight (28) years in prison.
January 17, 1985 Notice of Appeal filed.

Ohio Court of Appeals

June 2, 1986 Appellate counsel's certification that appeal is without merit and motion to withdraw filed.
June 9, 1986 Decision and Entry permitting appellate counsel to withdraw filed.
June 5, 1987 Court's Opinion affirming convictions and sentences as to all counts except count six in the indictment, which is reversed and vacated, filed.
June 15, 1987 Judgment Entry reversing Petitioner Penson's conviction and sentence on count six of indictment, but otherwise affirming judgment of trial court, filed.

Supreme Court of Ohio

October 21, 1987 Judgment Entry overruling Petitioner Penson's motion for leave to appeal and dismissing his appeal on the ground that no substantial constitutional question exists therein filed.

THE STATE OF OHIO, MONTGOMERY COUNTY

THE COURT OF COMMON PLEAS

MAY Terms in the year
Nineteen Hundred and Eighty-four

84-CR-1401

Filed: August 10, 1984

MONTGOMERY COUNTY, SS.

THE GRAND JURORS of the County of Montgomery, in the name, and the authority of the State of Ohio, on their oaths do present and find that JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August in the year one thousand nine hundred and eighty-four in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones not his spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A) (1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT ONE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT

SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, had on or about their person or under their control a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

Respectfully submitted,

LEE C. FALKE,
Prosecuting Attorney
Montgomery County, Ohio

By /s/ Walter D. Smith
Assistant Prosecuting Attorney

THE STATE OF OHIO, MONTGOMERY COUNTY

THE COURT OF COMMON PLEAS

MAY Terms in the year
Nineteen Hundred and Eighty-four

84-CR-1401

Filed: August 14, 1984

MONTGOMERY COUNTY, ss.

SECOND COUNT:

THE GRAND JURORS of the County of Montgomery, in the name, and the authority of the State of Ohio, on their oaths do present and find that JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August in the year one thousand nine hundred and eighty-four in the County of Montgomery, aforesaid, and State of Ohio, by force and with purpose to commit any therein felony offense, did trespass in an occupied structure, to-wit: a residence, located at 1947 Fairport, Apt. #104, Dayton, Ohio, or in a separately secured or separately occupied portion thereof, which structure was the permanent or temporary habitation of a person, and in which at that time a person, to-wit: James Jones was present: contrary to the form of the statute (in violation of Section 2911.11(A)(3) of the Ohio Revised Code)

in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWO:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

THIRD COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, in committing a theft offense as defined in Section 2913.01(K) of the Revised Code, to-wit: a violation of Section 2913.02 of the Revised Code, did have a deadly weapon, to-wit: a handgun, on or about their person or under their control; contrary to the form of the statute (in violation of Section 2911.01(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT THREE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit:

a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

FOURTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, in committing a theft offense as defined in Section 2913.01(K) of the Revised Code, to-wit: a violation of Section 2913.02 of the Revised Code, did have a deadly weapon, to-wit: a handgun, or about their person or under their control; contrary to the form of the statute (in violation of Section 2911.01(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT FOUR:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

FIFTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY

PENSON, on or about 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did knowingly cause physical harm to another, to-wit: James Jones, by means of a deadly weapon, to-wit: a handgun; contrary to the form of the statute (in violation of Section 2903.11(A)(2) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT FIVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SIXTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did knowingly cause physical harm to another, to-wit: Deborah Jones, by means of a deadly weapon, to-wit: a handgun; contrary to the form of the statute (in violation of Section 2903.11(A)(2) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT SIX:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT

SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SEVENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in County of Montgomery, aforesaid, and State of Ohio, did purposely engage in conduct, to-wit: without the privilege to do so, did insert any instrument, to-wit: the barrel of a handgun into the anal cavity of another, to-wit: James Jones, not their spouse by purposely compelling him to submit by force, which if successful would constitute or result in the offense of Felonious Sexual Penetration, to-wit: a violation of Section 2907.12(A)(1) of the Revised Code; contrary to the form of the statute (in violation of Section 2923.02 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT SEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

EIGHTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did purposely engage in conduct, to-wit: did engage in sexual conduct with another, to-wit: James Jones, not their spouse, by purposely compelling him to submit by force, which if successful, would constitute or result in the offense of RAPE, to-wit: a violation of Section 2907.02(A)(1) of the Revised Code; contrary to the form of the statute (in violation of Section 2923.02 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT EIGHT:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: by the authority of the State of Ohio, upon their oaths, (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

NINTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did have sexual contact with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to

submit by force; contrary to the form of the statute (in violation of Section 2907.05(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT NINE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of ~~August~~, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Re-

vised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

ELEVENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT ELEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWELFTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her

to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWELVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

THIRTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT THIRTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

tion of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

FOURTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT FOURTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

FIFTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

orah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT FIFTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SIXTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT SIXTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit:

a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SEVENTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT SEVENTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

EIGHTEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio,

did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT EIGHTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

NINETEENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT NINETEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their

person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTIETH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-FIRST COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in

the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Deborah Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-ONE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-SECOND COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-TWO:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their

person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-THIRD COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-THREE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-FOURTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in

the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-FOUR:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-FIFTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-FIVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and

STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-SIXTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-SIX:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-SEVENTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY

PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-SEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

TWENTY-EIGHTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: JOHN ALBERT SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to-wit: Mary Jones, not their spouse, by purposely compelling her to submit by force; contrary to the form of the statute (in violation of Section 2907.02(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-EIGHT:

The Grand Jurors further find and specify that while committing the aforesaid offense, JOHN ALBERT

SMITH, JR., RICHARD ALLEN BROOKS and STEVEN ANTHONY PENSON had on or about their person or under their control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

Respectfully submitted,

LEE C. FALKE
Prosecuting Attorney
Montgomery County, Ohio

By /s/ [Illegible]
Assistant Prosecuting Attorney

THE STATE OF OHIO, MONTGOMERY COUNTY

THE COURT OF COMMON PLEAS

MAY Terms in the year
Nineteen Hundred and Eighty-four

84-CR-1401

Filed: August 21, 1984

MONTGOMERY COUNTY, ss.

THE GRAND JURORS of the County of Montgomery, in the name, and the authority of the State of Ohio, on their oaths do present and find that STEVEN ANTHONY PENSON,

SPECIFICATION TO COUNT ONE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWO:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY

PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT THREE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT FOUR:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT FIVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT SIX:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY

PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT SEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT EIGHT:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT NINE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY

PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT ELEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWELVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT THIRTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT FOURTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY

PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT FIFTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT SIXTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT SEVENTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT EIGHTEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY

PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT NINETEEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-ONE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-TWO:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of

Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-THREE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-FOUR:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-FIVE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-SIX:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of

Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-SEVEN:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

SPECIFICATION TO COUNT TWENTY-EIGHT:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

TWENTY-NINTH COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: STEVEN ANTHONY PENSON, on or about the 4th day of August, 1984, in the County of Montgomery, aforesaid, and State of Ohio, did knowingly have a firearm, to wit: a handgun, said defendant having been previously convicted in the State of Ohio of an offense of violence, to-wit: Felonious Assault, on May 13, 1975, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio; contrary to the form of the statute (in violation of Section 2923.13(A)(2) of the Ohio Revised

Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-NINE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had on or about his person or under his control, a deadly weapon, to-wit: a firearm; contrary to the form of the statute (in violation of Sections 2929.71 and 2941.141 of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO COUNT TWENTY-NINE:

The Grand Jurors further find and specify that while committing the aforesaid offense, STEVEN ANTHONY PENSON had been previously convicted in the State of Ohio of a felony of violence, to-wit: Felonious Assault, in the case of State of Ohio versus STEVEN ANTHONY PENSON, being Case Number 75-CR-144, in the Common Pleas Court of Montgomery County, Ohio.

Respectfully submitted,

LEE C. FALKE
Prosecuting Attorney
Montgomery County, Ohio

By /s/ [Illegible]
Assistant Prosecuting Attorney

IN THE COMMON PLEAS COURT
OF MONTGOMERY COUNTY, OHIO

Case No. 84 CR 1401

STATE OF OHIO,
vs. *Plaintiff*,
STEVEN ANTHONY PENSON,
Defendant.

AMENDED ENTRY AND ORDER

Filed: January 9, 1985

The defendant herein having been convicted of the offenses of Rape (Fourteen Counts)—Count one, Counts ten through seventeen, Counts twenty-two through twenty-six (Firearm Specifications on each count, Aggravated Burglary (Firearm Specification) (Count Two), Aggravated Robbery—Two Counts (Firearm Specification) (Counts three and four), Felonious Assault—Two Counts (Firearm Specification) (Counts five and six), Attempted Rape (Firearm Specification) (Count eight), Gross Sexual Imposition (Firearm Specification) (Count nine) and Having Weapon While Under disability (Firearm Specification) (Count twenty-nine), was on December 21, 1984, brought before the Court;

WHEREFORE, it is the JUDGMENT AND SENTENCE of the Court that the defendant herein be delivered to Chillicothe Correctional Institute, there to be imprisoned and confined for a term of not less than fifteen (15) years nor more than twenty-five (25) years

on counts one through four, ten through seventeen and twenty-two through twenty-six, not less than twelve (12) years nor more than fifteen (15) years on Counts five, six and eight, not less than three (3) years nor more than five (5) years on Counts nine and twenty-nine. On Count Two there is an additional term of THREE (3) YEARS ACTUAL INCARCERATION for the Firearm Specification, which shall be served consecutively with, and prior to, all other term of imprisonment. ALL other sentences are to be served concurrently with each other; said sentences to be served consecutively with the sentence imposed in 84 CR 1056. ALL sentences pertaining to the Rape counts are to be ACTUAL INCARCERATION,

and further, that he pay the costs of this prosecution taxed at \$_____, upon which execution is hereby awarded. Defendant is to receive _____ days credit for confinement.

The Court did fully explain to defendant his appellate rights and the defendant informed the Court that he understood said rights.

The defendant is sentenced under Sections 2907.02, 2911.11, 2911.01, 2903.11, 2923.02, 2907.02, 2905.05, 2923.13, 2929.71 and 2941.141, O.R.C. Bond is released.

APPROVED:

/s/ Kilpatrick
JUDGE W. ERWIN KILPATRICK

LEE C. FALKE
Prosecuting Attorney of
Montgomery County, Ohio

By /s/ Terry L. Seeberger
TERRY L. SEEBERGER
Assistant Prosecutor

CC: Michael Monta, 3625 Old Salem Ave., Dayton, OH.

COURT OF APPEALS
FOR MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

Case No. 9193

STATE OF OHIO,

Appellee,

vs.

STEVEN ANTHONY PENSON,

Appellant.

CERTIFICATION OF MERITLESS APPEAL
AND MOTION

Filed June 2, 1985

Appellant's attorney respectfully certifies to the Court that he has carefully reviewed the within record on appeal, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1056, that he has found no errors requiring reversal, modification and/or vacation of appellant's jury trial convictions and/or the trial court's sentence in Case No. 84-CR-1401, and that he will not file a meritless appeal in this matter.

MOTION

Appellant's attorney respectfully requests a Journal Entry permitting him to withdraw as appellant's appellate

attorney of record in this appeal thereby relieving appellant's attorney of any further responsibility to prosecute this appeal with the attorney/client relationship terminated effective on the date file-stamped on this Motion.

CERTIFICATION OF SERVICE

On June 2, 1986, I served this document by Ordinary Mail Service upon:

Mr. Ted Millspaugh
Prosecutor's Office
308 Mont. Co. Cts. Bldg.
41 North Perry Street
Dayton OH 45402

Mr. Steven Anthony Penson
K-3-56 #182582
P.O. Box 45699
Lucasville OH 45699-0001

Respectfully submitted

DOUGLAS R. SHAEFFER 513/434-7667
Appellant's Attorney
1404 Beaverton Drive Suite 200
Kettering OH 45429

**IN THE COURT OF APPEALS
OF MONTGOMERY COUNTY, OHIO**

(Title Omitted in Printing)

DECISION AND ENTRY

Rendered on the 9th day of June, 1986

PER CURIAM:

This case is before the court on the filing of a motion to withdraw as counsel and a certificate of meritless appeal by counsel. The attorney for the defendant-appellant states that there are no meritorious issues for appeal. Accordingly, Douglas R. Shaeffer is withdrawn as counsel for defendant-appellant Steven Anthony Penson.

Appellant Steven Anthony Penson is hereby granted thirty (30) days from the date of this decision and entry to file an appellate brief, pro se, if desired, in furtherance of his appeal. The case will then proceed according to the appellate rules. This court notes that the transcript of the proceedings has been filed and will at the proper time independently review the record thoroughly to determine whether any error exists requiring reversal or modification of sentence, in consideration of the nature of the charges and length of sentence imposed.

/s/ James A. Brogan
JAMES A. BROGAN
Presiding Judge

/s/ William H. Wolff, Jr.
WILLIAM H. WOLFF, JR.
Judge

IN THE COURT OF APPEALS
OF MONTGOMERY COUNTY, OHIO

(Title Omitted in Printing)

OPINION

Rendered on the 5th day of June, 1987

PER CURIAM:

On August 4, 1984 James Jones, his wife, Deborah Jones and their two sons were residing at 1947 Fairport Avenue Apartment 104 in Montgomery County. Also living at that address was James' sister, Mary Jones and her son.

Sometime after 12:30 a.m. that morning, Steve Penson broke through the bedroom window of the apartment wielding a pistol. Penson demanded money and began searching James' jacket. At the same time, two other men, identified as Richard Brooks and John Albert Smith, Jr. kicked in the front door of the apartment and came inside. Over the course of approximately the next one to two and one-half hours the men sexually assaulted, sodomized, and brutalized the adult residents. Before leaving, the men also took several items from the apartment. Brooks was told to kill Deborah and James but, was unable to do so and left the apartment after telling them to count to 2000.

After the assailants left, James Jones went upstairs to a neighbor's apartment and called the police. The parties were thereafter taken to Good Samaritan Hospital for medical treatment.

On August 10, 1984, the Montgomery County Grand Jury indicted defendant Penson on one count of rape, with a firearm specification. On August 14, 1984 de-

fendant was indicted on twenty additional counts of rape; one count of aggravated burglary; two counts of aggravated robbery; two counts of felonious assault; one count of felonious sexual penetration; and one count of gross sexual imposition. Each of the above counts contained a firearm specification and a specification that defendant had been previously convicted in the State of Ohio of felonious assault.

Defendant was tried jointly with co-defendants Smith and Brooks before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding defendant guilty on fourteen counts of Rape (Count One, Counts Ten through Seventeen, and Counts Twenty-Two through Twenty-Six) with firearm specifications on each count; guilty of Aggravated Burglary (Count Two) with a firearm specification; guilty of two counts of Aggravated Robbery (Counts Three and Four) with firearm specifications on each count; guilty of two counts of Felonious Assault (Counts Five and Six) with firearm specifications on each count; guilty of Attempted Rape (Count Eight) with a firearm specification; guilty of Gross Sexual Imposition (Count Nine) with a firearm specification; and guilty of having a firearm under a disability (Count twenty-nine).

On December 27, 1984 the trial court filed an entry and order sentencing defendant to Chillicothe Correctional Institute for a term of not less than fifteen (15) years nor more than twenty-five (25) years on counts one through four, ten through seventeen and twenty-two through twenty-six, not less than twelve (12) years nor more than fifteen (15) years on Counts Five, Six and Eight and not less than Three (3) years nor more than five (5) years on Count Twenty-Nine. On Count Two there is an additional term of three (3) years actual incarceration for the Firearm specification, which shall be served consecutively with, and prior to, all other terms of imprisonment. All other sentences are to be served

concurrently with each other; said sentences to be served consecutively with the sentence imposed on 84 CR 1056, an amended entry and order was filed on January 9, 1985 to state that all sentences pertaining to the rape counts were to be actual incarceration.

Defendant-appellant filed a timely notice of appeal from the judgment and sentence imposed thereon. On June 2, 1986, appellant's counsel filed an *Anders* brief stating there was no meritorious issues to be considered on appeal. By decision and entry dated June 9, 1986 this court allowed Douglas Shaeffer to withdraw as counsel and granted appellant 30 days to file his own brief. Appellant was granted an extension on June 27, 1986. On July 24, 1986 appellant's request for the loan of the trial transcript was granted and he was given an additional 60 days to complete his brief. Another extension of 60 days was granted by entry dated September 15, 1986. On November 13, 1986 this court overruled appellant's request for the appointment of new counsel and granted appellant 15 more days to use the transcript. A final extension of 25 days was granted in which appellant was to file the brief. No brief was ever filed in the above captioned case.

Pursuant to our duties under *Anders v. California* (1967), 386 U.S. 738, this court must undertake a full examination of the record to determine whether the defendant was accorded a fair trial and whether any grave or prejudicial errors occurred therein. *See also, State v. Toney* (1970), 23 Ohio App. 2d 203.

Initially, this court is troubled by the filing of an *Anders* brief in the present action. We find counsel's claim that the record does not reveal any assignment of error which could arguably support the appeal to be highly questionable. We reach this conclusion in light of our examination of the considerable briefs filed by co-defendants' Brooks and Smith's counsel in their respective appeals. Because we have thoroughly examined the

record and already considered the assignments of error raised in the other defendants' appeals, we find appellant has suffered no prejudice in his counsel's failure to give a more conscientious examination of the record.

The record of the trial court does support several arguable claims. Our full consideration of each may be examined in the decisions rendered in the companion defendants' appeals. *See, State v. John A. Smith* (May 13, 1987) Montgomery App. No. 9168, unreported and *State v. Richard Brooks* (June 4, 1987) Montgomery App. No. 9190, unreported.

In examining the record, we find one issue which requires our attention. The problem involves the trial court's failure to instruct the jury on an element of felonious assault. Appellant was charged in counts five and six with having knowingly caused physical harm to James and Deborah Jones by means of a deadly weapon. The trial court neglected to include the deadly weapon portion of the charge.

However, appellant's counsel failed to object to the charge as given. Absent plain error, the failure to object constitutes a waiver. *State v. Underwood* (1983), 3 Ohio St. 3d 12. Generally, failure to separately and specifically instruct on every essential element of the crime charged is not *per se* plain error. *State v. Adams* (1980), 62 Ohio St. 3d 151. A reviewing court must examine the record to determine the probable impact of the court's failure to charge an element of the offense and consider whether substantial prejudice may have been visited on the defendant. *Id.* at 154.

With regard to count five involving James Jones, the state introduced the testimony of several witnesses to demonstrate that he had suffered physical harm as a result of being hit with the gun. James testified that appellant and Steve Penson hit him repeatedly with the

pistol about the head and body. (Tr. 208, 211, 212, 214). Deborah Jones testified that she saw James being hit with the gun and that he was bleeding from the head. (Tr. 490, 492). Dr. Terraro testified that James had multiple lacerations on his head and face which required 36 stitches. (Tr. 458). He stated that the injuries were consistent with James' claim that he had been beaten with a gun. (Tr. 458).

The appellant presented no evidence to contradict or refute the testimony inasmuch as the theory of defense presented by all of the defendants was that they were not the persons who committed the acts. In finding appellant guilty on count six, the jury necessarily rejected the proffered defense and believed beyond a reasonable doubt that appellant caused physical harm to James Jones by means of a deadly weapon. We cannot find that, except for the error, the outcome of the jury's decision on this count clearly would have been otherwise.

With regard to count six concerning Deborah Jones, the record is devoid of any evidence that she suffered physical harm by means of a deadly weapon. The only two references in the record which lend any support to the felonious assault charge are at pages 489 and 494 of the transcript,

A. Yes. He had a gun up to my head now and I was sitting on top of the fat one.

OK, well, he came back and then he had the gun to my head and he had his penis in my butt and the other one had his penis in my vagina at the same time and—(crying)

...

Q. Were you face up or face down?

A. No, I was laying sideways cause I could feel the pressure of the gun through the pillow, like in my face.

This evidence alone, as a matter of law, was insufficient to support the finding that appellant committed felonious assault against Ms. Jones. The outcome of the trial may clearly have been different had the court properly charged the jury. Accordingly, we must reverse appellant's conviction and vacate the sentence imposed on count six of the indictment. As modified, the judgment of the trial court is affirmed.

WILSON, J., BROGAN, J., and FAIN, J., concur.

IN THE COURT OF APPEALS
OF MONTGOMERY COUNTY, OHIO

(Title Omitted in Printing)

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 5th day of June, 1987, appellant's conviction on count six of the indictment is reversed and the sentence imposed is vacated, and, as modified, the judgment of the trial court is affirmed.

/s/ R. K. Wilson
RICHARD K. WILSON
Judge

/s/ James A. Brogan
JAMES A. BROGAN
Judge

/s/ Mike Fain
MIKE FAIN
Judge

THE SUPREME COURT OF OHIO
COLUMBUS

1987 TERM

To wit: October 21, 1987

Case No. 87-1341

STATE OF OHIO,

Appellee,

v.

STEVEN A. PENSON,

Appellant.

ENTRY

Upon consideration of the motion for leave to appeal from the Court of Appeals for Montgomery County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed *sua sponte* for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 21st day of October, 1987.

MARCI A. MENGEL
Clerk

/s/ Rita A. Jackson
Deputy

SUPREME COURT OF THE UNITED STATES

No. 87-6116

STEVEN PENSON,

Petitioner,

v.

OHIO

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF OHIO,
MONTGOMERY COUNTY

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 22, 1988